SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 322

JOSEPH EUGENE BAXTER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case. The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATEMENT OF FACTS

On March 3, 1964, at about 9:40 p.m., petitioner accompanied by two other men was driving his car on public highway, U.S. 42, a mile and a half west of Union, Kentucky. Petitioner's car was towing a trailer. (R. 15a). A Kentucky state highway trooper noticed Petitioner's car,

which appeared to be having some kind of automotive difficulty. (R. 16a). When the car came to a stop, the trooper pulled up and parked behind it to see if he could assist petitioner. (R. 16a). Petitioner left his car and walked toward the rear of the trailer to meet the trooper. He advised the trooper that he had a flat tire and asked the trooper to get help for him. (R. 17a).

The trailer that was being towed by petitioner's car was one of the larger type rental vehicles used for hauling. (R. 18a). It was enclosed by four wooden sides, and had an open top which was covered with a tarpaulin. (R. 18a). The trooper testified that when he got alongside the trailer, he thought he smelled whiskey mash. (R. 18a). By his own statement, the trooper had aided in the investigation of moonshine stills only "to a limited degree." (R. 27a). No evidence in the record indicates that petitioner was known to the trooper or that the trooper had any reason to be on the look-out for the transportation of moonshine or moonshine making equipment along the highway at that time. The trooper admitted that he could see only a glimpse of several large steel drums and parts of furniture on the trailer. (R. 18a). When he asked petitioner what was in the trailer, petitioner told him he was moving some furniture and calf feed. (R. 19a). The trooper then told petitioner to show him the calf feed. (R. 22a) Petitioner loosened one part of the tarpaulin revealing the steel drums. (R. 23a).

Because he did not have a warrant, and apparently was not sure what he should do, the trooper decided to detain petitioner until a federal Alcohol and Tobacco Agent could be brought to the scene. (R. 26a). The trooper then made two calls on his radio: one to a nearby service station to have someone come and take the tire to be repaired; the other to summon an appropriate federal agent. (R. 29a). The tire was repaired and replaced before the federal agent arrived. (R. 29a).

Petitioner was told by the state trooper before the federal agent arrived that he would be detained until the federal agent arrived. (R. 28a-29a). The record indicates that he was neither told specifically that he was under arrest, nor informed of the offense for which he was arrested. In fact, he was never charged with any state offense (R. 26a), and the state trooper testified that he never even arrested petitioner. (R. 20a, 26a). The record, however, shows that the state trooper did in fact arrest petitioner; and the Circuit Court so found. (R. 29a). The trooper testified: "I told him that I would have to detain him a couple of minutes. Mr. Reimer [the federal agent] was on the way then."

When the federal agent arrived, he specifically told petitioner that he was being placed under arrest. (R. 24a). The federal agent identified himself and informed petitioner that he was under arrest for violation of the U.S. Internal Revenue laws, and incident to the arrest (R. 38a), the federal agent seized the trailer and its contents (R. 25a). One of petitioner's passengers untied the tarpaulin and pulled it back fully from the steel drums at the direction of the federal officer. (R. 37a)

The trailer and its contents were searched later that evening while petitioner was held without counsel in a local jail in Burlington, Kentucky. As it turned out, the trailer contained mash fit for distillation and "moonshine" making equipment. (R. 22a). Petitioner was kept in jail and was not allowed to call an attorney, from the early morning hours of March 4 until late that afternoon. (R. 31a).

On September 29, 1964, petitioner was tried before the Honorable Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky. By stipulation the testimony taken on the motion to suppress the evidence seized was accepted as evidence for the purpose of trial without a jury. (R. 4a). Petitioner was

found guilty of illegally producing and transporting mash fit for distillation, and possessing property used for producing illegal spirits in violation of 26 U.S.C. 5222(a)(1) and 5686(a). (R. 6a). On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed on May 17, 1966. An order to stay the mandate was entered on June 8, 1966. A petition for a writ of certiorari was filed with this Court on July 7, 1966 for extraordinary reasons which will be discussed below.

ISSUES

1. Where an individual has been detained against his will by one officer so that another may decide whether or not to arrest him, has that individual been so deprived of his freedom of action in such a significant way that an unconstitutional arrest has occurred?

2. Absent exigent circumstances, may an officer constitutionally make an arrest without first identifying himself, announcing the fact of arrest, and informing the individual of the offense for which he is arrested?

3. Where good cause is shown may a petition for a writ of certiorari be considered on the merits by this Court after the thirty days allowed by Rule 22(2)?

ARGUMENT

I. Where an individual is detained against his will by one officer so that another may decide whether or not to arrest him the individual has been so deprived of his freedom of action in such a significant way that an unconstitutional arrest has occurred.

Few points in time are more crucial in the administration of justice than the instant of arrest. No warrantless search of the person may be made before it. *Beck* v. *Ohio,* 379 U.S. 89 (1964). No evidence gathered after it may serve to constitute the probable cause justifying the arrest itself. *United States* v. *Di Re,* 332 U.S. 581, 595 (1947). And once an arrest has occurred, the putative defendant is entitled to the full panoply of the protections of the law including specific warnings and the right to counsel. *Miranda* v. *Arizona,* 34 L.W. 4521 (1966). Yet, under the law today, it is not at all clear precisely when in point of time an arrest has occurred.

Traditionally, arrest was narrowly defined. Blackstone, 4 *Commentaries* 289, defined arrest as the "apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime." Blackstone's view was widely followed in this country for many years. Indeed, it was adopted in Section 18 of the Model Code of Criminal Procedure of 1930 by the American Law Institute. However, two parallel but contrasting cases decided by this Court in 1959 and 1960 cast serious doubt on the continuing vitality of Blackstone's narrow view.

In *Henry* v. *United States,* 361 U.S. 98 (1959), this Court held (and the Government conceded) that an arrest had occurred when two F.B.I. agents stopped a car during an investigation of a theft from an interstate shipment. This Court held that when "liberty of movement" was "restricted" arrest was complete. 361 U.S. at 103. The agents there had stopped the car thinking, but not having probable cause to warrant it, that the car might contain

stolen cartons; they only wanted, at first, to question the suspects in the car. Evidence, which was obtained after the car was stopped, was ordered suppressed because the stop was not made on probable cause, and the judgment of conviction was reversed.

In *Rios* v. *United States,* 364 U.S. 253 (1960), this Court was faced with a closely parallel situation. Two Los Angeles police officers had walked up to a taxicab into which an individual had entered under suspicion-arousing circumstances not amounting to probable cause. The Government argued that the policemen approached the standing taxi only for the purpose of routine interrogation and that they had no intent to detain the suspect beyond the momentary requirements of such a mission. This Court remanded that case ordering the District Court to take additional evidence on the narrow question—when did the arrest occur? It thus gave credence to the theory of the Government that there had been no arrest at the time the car was stopped—a theory which was clearly at odds with the ruling in *Henry.*

On remand, the District Court found the disputed factual questions against Rios, denied the motion to suppress, and refused to direct a judgment of acquittal. *United States* v. *Rios,* 192 F. Supp. 888 (S.D. Cal. 1961). Apparently, there was no appeal.

The broad language of *Henry* must be read in light of the remand of *Rios.* The results in the two cases are in sharp contrast, *Rios* undercutting the protections guaranteed by *Henry* and leaving petitioner's rights in doubt.

Presently left unclear is the question—what circumstances, in addition to the restriction of liberty of movement, will transform such an unspecific detention into an arrest? Detention to hold to answer or detention for a stated offense, both obviously constitute an arrest. But what about a restriction for other, more limited purposes? Stopping a person to ask for directions or perhaps for a

match need not constitute an arrest. Yet each involves a restriction on liberty of movement. Between these two extremes numerous, now questionable, situations may be envisioned. The crucial issue in each situation seems to be the *reason* for the detention.

This petition for certiorari presents this Court with the perfect vehicle to explore and clarify this situation. Here, the restraint on liberty considered in *Henry* was clearly present. The Court of Appeals below correctly so noted. Here, however, unlike *Rios*, the purpose of the detention *is* evident. Petitioner was held by the state troopr so that the federal agent could arrive and decide whether to arrest petitioner for a federal offense. This reason, we respectfully suggest, gives the initial detention such a legal significance that it must be deemed an arrest. The precise time of such a detention has important legal consequences; see, *Miranda* v. *Arizona*, 34 L.W. at 4523: where this Court said that upon "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedem of action in any significant way" certain constitutional rights attached.

The detention in this case was not such a small bother that its inconvenience could be termed the price each of us should be willing to pay for life in a modern urban setting as, it might be argued, is a momentary stop under suspicious circumstances or a short detention to verify an offered explanation. Here the purpose of detention was to allow another officer the opportunity to make an arrest on no better information, and after no further legal process, than the stopping officer already had. The first detention, we submit, is thus tantamount to the later formal arrest itself. This result we find ineluctable. On this point alone, we are in agreement with the Court of Appeals below. And this conclusion leads to Point II and the constitutional question whether the evidence then seized incident to the arrest was legal and admissible or not.

II. Absent exigent circumstances an officer may not constitutionally arrest without first identifying himself, announcing the fact of arrest, and informing the individual arrested of the offense for which he is arrested.

If an arrest occurred when the petitioner first was detained against his will, was that original arrest, unaccompanied by an announcement of the identity of the officer, the fact of the arrest, and a statement of the offense for which the arrest was being made, constitutionally lawful? Counsel has been unable to find any decision of this Court squarely resolving this point. The issue was involved in *United States* v. *Di Re,* 332 U.S. 581 (1948), a prosecution for the possession of counterfeit gasoline ration coupons seized in a search incident to an arrest. There Mr. Justice Jackson, in the majority opinion, noted that some of the Court would have held that making the proper announcement at the time of an arrest is, except under exceptional circumstances, a requisite to a valid arrest. At 588. Because the record was not clear, that case was decided on other grounds. A significant case of first impression is, therefore, presented for decision by this petition.

Reflecting a recommended common law practice, see Hale II, *Pleas of the Crown* 116[1], Kentucky law requires an arresting officer making an arrest to inform the person to be arrested "of the intention to arrest him and of the offense for which he is being arrested." *Ky. Rev. Stat.* 431.025 (1962). The Fourth Amendment of the United States

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[1] Concerning arrest on a warrant, Lord Hale observed:

> . . . it is reasonable and also safe for the officer to acquaint [the party to be arrested] what he . . . arresteth him for, for it is a great security to the officer that arrests him, and just for the party arrested to know the cause for what it is.

Hale's view usually represented what was the then English rule or, if it did not, it recommended a better practice which later "hardened into law." Lasson, *The History and Development of the fourth Amendment,* 35 (1937).

Constitution similiarly has been read to require an announcement of authority and purpose prior to forcible entry into a home. Cf. *Ker* v. *California*, 374 U.S. 23 (1963) (exception to general rule found); *Miller* v. *United States*, 557 U.S. 301 (1958) (case decided on non-constitutional grounds under 18 U.S.C. 3109). It would be anomalous indeed if this Court permitted less formality to hold a *person* against his will than it required prior to invasion of the privacy of that person's property.

Indeed, the Court of Appeals below did not deny the existence of the Kentucky rule. Instead it chose to follow Kentucky's evasion of its statutory rule holding that the statement need not be made where the party to be arrested "knows" the occasion for the detention. The Circuit Court relied on these cases: *Dale* v. *Commonwealth*, 186 Ky. 510, 514 (1920); *Sizemore* v. *Commonwealth*, 279 Ky. 190 (1939); *Nickell* v. *Commonwealth*, 285 S.W. 2d 495 (1955); and *United States* v. *McGavic*, 337 F. 2d 317, 321 (6th 1964).

It is urged that, unless carefully circumscribed, an expansion of the exceptions to the general rule requiring announcement would deprive the party to be arrested of the presumption of innocence. Such an interpretation can not be squared with the required standard of reasonableness of the Fourth Amendment. It is not enough to say that the guilty party knows why he is arrested. The right to be notified belongs to the innocent and guilty alike and no shortcut or retroactive rationalization will do. Until after judgment at trial no officer can make a valid distinction between the innocent and the guilty. The Constitution forbids such a distinction before trial.

We concede, of course, that in some situations the circumstances themselves might give sufficient notice of the basis for arrest as, for example, where a poacher in the

woods sees another "at his heels." *Rex* v. *Davis* (1843) 173 Eng. Rept. 343 (Baron Park). Cases such as this, or those relied on by the court below, dealing with exceptions to the general statutory rule do not cut against petitioner's position here, since factually the Kentucky cases cited by the court below are distinguishable.

Indeed, if anything, those cases establish by inference the general rule for which petitioner argues. *Dale* involved a re-arrest after an escape. *Sizemore* involved a drunk and disorderly person as did *Nickell*. *McGavic* involved flight after an individual had been caught in the act of "slugging" a coin changer. In the instant case, petitioner was not breaching the peace nor was he in flight. As in *Di Re*, he was an otherwise innocent motorist. And, as in *Di Re*, he was entitled to be informed of the charge on which he was held. Thus, the applicable Kentucky law of arrest *did* require the arresting officer to advise petitioner who he was, that he was under arrest and what he was under arrest for.

Such a procedure as petitioner calls for is no mere empty formality. Here had an announcement been made petitioner's rights would have been fixed. But because the trooper never formally arrested petitioner nor advised him of the reason for arrest it is not clear exactly when petitioner was arrested, nor is it absolutely clear whether the incriminating evidence in the towed truck was shown to the state trooper after petitioner's arrest. Since there is an absence of direct testimony to the contrary, the natural course of the events about which we *do* know from the record certainly indicate that petitioner would not have opened the truck for the trooper unless ordered to do so while under arrest. Indeed, only such a conclusion is consistent with what testimony is available. Petitioner's rights were left in doubt because proper procedures were not followed.

In *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964), this Court observed:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

If formal announcement was the universally enforced rule all citizens would then be placed in a secure position. The point of arrest would be clearly fixed at the time when in fact it occurred and was announced as such. Hindsight would not be allowed to move the time around for the purpose of perfecting subsequent litigation. Rights once fixed would remain so.

Such a requirement would place no great burden on law enforcement. This Court observed in *Miller* v. *United States,* 357 U.S. 301, 309-310 (1958) about the question of announcement prior to forcible entry: "The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case." No valid reason can be offered for the failure to announce in petitioner's case.

In light of the constitutional significance attached to the point in time at which an arrest occurs, the adoption by this Court of a rule requiring that it be expressly marked by the arresting officer would materially advance the proper administration of justice. Petitioner respectfully suggests that this petition for certiorari presents the Court with a suitable situation for clarifying this vital area of the law.

III. The petition for a writ of certiorari should not be denied as untimely made.

III—Until June 18, 1966 counsel for petitioner was Daniel Davies, Esquire, 331 York Street, Newport, Kentucky, a member of the Kentucky Bar. Mr. Davies represented petitioner in the District Court and the Circuit Court proceedings.

Earlier this year Mr. Davies' sole law partner died. His partner had been admitted to practice before this Court; Mr. Davies is not. Mr. Davies is now 69 years old and is suffering from an inoperable condition on the retinas of both his eyes. He is aged, unwell, alone in practice, and as a result he was forced to abandon this case.

The Sixth Circuit Court of Appeals rendered its judgment in this case on May 17, 1966. The order to stay the mandate was entered on June 8, 1966. Proceeding under the theory that the thirty-day period for pursuing this appeal began on June 8, Mr. Davies asked for assistance in this matter. On June 18, 1966, counsel herein was retained by petitioner. Because Mr. Davies is in Newport, Ky., and petitioner is in Detroit, Michigan where he now works and resides, counsel herein did not receive the formal papers pertaining to this case until June 22, 1966. At this time counsel herein became aware of the fact that the thirty-day period allowed by Supreme Court Rule 22(2) had expired *before* counsel had been retained. Petitioner was informed of this, and he desires to proceed with the appeal, nonetheless, on the following grounds.

This case involves crucial questions concerning the law of arrest, search and seizure—questions vital to the administration of criminal justice in the federal courts. These issues have become highlighted around the country recently by decisions of this Court, particularly the *Escobedo* case and its progeny—especially *Miranda* v. *United States, supra.* Obviously, this Court's consideration of his appeal

is of tremendous personal import to petitioner who has been sentenced to a year and a day in jail in this case.

For this Court to allow this petition, while not an ordinary practice ,would not be a radical departure from precedent or from good practice. Rule 22(2) does not set up a jurisdictional bar. Boskey, West Federal Forms, S. 201; *Heflin* v. *U. S.*, 358 U.S. 415 (1959), see footnote 7 at page 418. Rather Rule 22(2) is a rule of practice for this Court, promulgated by this Court, and which for proper reasons may be waived by this Court. Indeed, when proper grounds have been shown this Court has taken such action. E.g. *McAbee* v. *U. S.*, 361 U.S. 537 (1960); *Preston* v. *U. S.*, 376 U.S. 364 (1963).

Since other aspects of appellate procedure have been dealt with statutorily, it is apparent that this particular matter has been left within this Court's power and discretion. And since this Court created Rule 22(2), there is no reason why it may not waive it for proper reasons. In fact the Rule itself provides for certain waiver.

Petitioner urges that this case is one where this Court should allow consideration of the petition on the merits, notwithstanding the failure to file this petition within the thirty days required by Rule 22(2). The significance of the issues involved, the equities urged by petitioner, and the fact that none of the parties nor the Court itself (now in adjournment) would be prejudiced by this concession—all combine to support this request.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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